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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

1995

In the Matter of:	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253

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To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Area Commission of Greenville Technical College, Board of Regents of the University of Wisconsin System, California State University, Dallas County Community College District, INTELECOM Intelligent Telecommunications, The Ohio State University, Oregon State System of Higher Education, Portland Community College, Public Television 19, Inc., Regents of the University of Minnesota, South Carolina Educational Television Commission, St. Louis Regional Educational and Public Television Commission, State of Wisconsin-Educational Communications Board, Troy State University, University of Maine System, University System of the Ana G. Mendez Educational Foundation and Washington State University (collectively,

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the "ITFS Parties"), by their attorneys, and pursuant to Section 1.429 of the FCC's Rules, petition for reconsideration and clarification of certain aspects of the Commission's Report and Order in the referenced matter.

Introduction

The ITFS Parties are public or private educational institutions or systems, state educational telecommunications agencies, public broadcasters and, in one case, a consortium of community colleges. Each of the ITFS Parties operates ITFS facilities, in some cases on a state-wide or regional basis. Each also has entered or has considered entering excess capacity agreements with wireless cable operators or other potential users. Several of the ITFS Parties are among the nation's oldest and largest ITFS system operators, and they have, since the ground-breaking decision in the 1983 Report and Order in Gen. Docket 80-112 and CC Docket 80-116, consistently participated in FCC inquiries and rulemaking proceedings affecting ITFS. Although motivated by their educational missions, the ITFS Parties support the Commission's policies permitting excess capacity on ITFS stations to be used for non-ITFS purposes and they acknowledge the technical, operational and financial support they and others have received in connection with the sale of excess capacity.

However, the ITFS Parties are extremely troubled by one aspect of the Report and Order. The Commission's decision to permit BTA licensees first refusal rights in excess capacity agreements, made entirely without prior notice or opportunity for comment, far oversteps permissible legal and policy bounds and compromises ITFS contracting opportunities and bidding procedures, which are sometimes mandatory (or at least advisable) under state law. The Commission should reconsider this matter.

In addition, the ITFS Parties urge the FCC to clarify that the BTA-wide interference protection rule for wireless cable channels will not hamper the ability of ITFS operators to adjust and expand their ITFS operations, so long as the BTA licensee's licensed or leased MMDS or ITFS facilities will not be adversely affected. Also, the FCC should clarify that new Section 21.938(c) of the Rules protects incumbent ITFS stations as well as incumbent MMDS stations from harmful interference.

Right of First Refusal in Excess Capacity Agreements

The Report and Order states that, in furtherance of the FCC's goal of accumulating a full complement of channels, the BTA licensee will be afforded the right to match the final offer of any proposed lessee of ITFS excess capacity. This scheme was adopted without any notice whatsoever to ITFS licensees that their contracting rights were in issue in this proceeding, and ITFS licensees therefore had no opportunity to point out that such a notion undermines their ability to achieve fair contractual terms, assaults their right to contract with parties with whom they wish to do business, violates Constitutional guarantees of freedom of association and speech, and sets up potential clashes between state and local procurement laws and FCC rules. The first refusal scheme is ill-conceived and illegal. It must be eliminated.

Plainly, the existence of a right of first refusal undermines the ability of a contracting party so encumbered to obtain the best possible deal, and perhaps even a fair deal. This is commonly understood in commercial transactions, where a right of first refusal in favor of a third party often means that no one other than the third party will even bother to try to negotiate a deal. In the context of ITFS excess capacity agreements, the Commission's imposition of such an obligation on ITFS licensees (which, after all, is the effect of granting a "right" to the BTA

licensee) will often mean that no one other than the BTA licensee will have any interest in negotiating an agreement. This eliminates the prospect of seeking bids from interested wireless cable operators, a process that often results in the best possible offer for the ITFS licensee. It also means that the BTA licensee, which will often now be the only prospective offeror, can specify below-market or unfair terms for an agreement on a "take it or leave it" basis, with full confidence that, if the ITFS licensee "leaves it" and seeks a fairer deal elsewhere, it can always step in and take over that deal. There is simply no risk to the BTA licensee being as cavalier as it wants.

The existence of a right of first refusal in favor of the BTA licensee also puts a rigid straight-jacket on ITFS licensees who sometimes enter excess capacity agreements for purposes other than wireless cable. Certain of the ITFS parties have entered contracts to use excess capacity to transmit programming on a short-term basis (such as to facilitate coverage of a transitory event) or as an accommodation to a local business or charitable enterprise. If the only thing at stake was the revenue received by the ITFS licensee, a right by the BTA licensee to step in and pay the same money might not be so bad. But ITFS licensees enter excess capacity agreements to accommodate other interests, and they should have that right.

The greatest harm of the first refusal right is probably the notion that an ITFS party may be compelled by this FCC invention to enter into a contract with a person or entity with which the ITFS party simply does not wish to deal. It is no secret that the wireless cable industry has up to now had more than its share of unscrupulous speculators. In bidding procedures, many of the ITFS Parties have encountered prospective bidders with whom the ITFS Party would not deal because of their behavior in the bidding process, their reputation, their lack of connection to the

community or state, or other factors. The FCC has no right to tell a public university, a state agency, a community college or a private non-profit organization that it must, if it wants to lease excess capacity, lease that capacity to some particular entity that has paid the biggest fee to the federal government. The FCC may have the right to tell ITFS licensees that they cannot lease capacity to certain potential users (such as local cable systems), but it cannot order ITFS licensees to contract with a particular party of the FCC's choosing.

At stake here is more than simply the right of freedom to contract, although that right is still protected from arbitrary restraint by unreasonable regulations. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937). The first refusal obligation imposed here by the FCC impinges on the right of the ITFS licensee to freedom of speech and association that are protected by the First Amendment. "Implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." Roberts v. United States Jaycees, 468 U.S. 607, 622 (1984). Infringements on freedom of expressive association "may [only] be justified by regulations adopted to serve compelling state interests ... that cannot be achieved through means significantly less restrictive of associational freedoms." Id. at 623. The aggregation of channels by parties paying the most money to the federal treasury hardly constitutes a compelling state interest, and the FCC has not even analyzed whether its goals can be accomplished by less restrictive means, or whether its chosen means will actually further the goal.

ITFS stations are outlets of expression for which their licensees are responsible, both legally and in the public mind. So long as the facilities are used for educational purposes as

specified in Section 74.931 of the Rules, the FCC has never presumed to tell a licensee that it must transmit any particular program on its station. Yet here, the FCC has decided that a licensee can, against its will, be forced to transmit the programming chosen by some third party with whom the ITFS licensee has not chosen to deal. The first refusal right clearly intrudes into the editorial function of the ITFS licensee, in violation of the standards set forth in cases such as Miami Herald Publishing Co. V. Tornillo, 418 U.S. 241, 257-58 (1974).

Finally, first refusal rights conflict with state and local laws and institutional policies that, in many cases, oblige the ITFS licensee to engage in competitive procurement procedures in order to award an excess capacity agreement. Now, a licensee could go through that process, award the agreement to the prevailing bidder, then have the agreement taken over by the BTA licensee in violation of the rights of the winning bidder. By adopting the first refusal rule, the FCC either blithely assumed that it's rule should result in federal preemption of state and local contracting requirements or it failed even to contemplate that consideration and comity should be given to these requirements.

By failing to propose and request comment on the right of first refusal, the Commission has blundered into a serious mistake. The Commission cannot "sell" ITFS excess capacity rights on ITFS stations to the highest bidder to the federal treasury, and even if it could, such an approach would be bad policy. The right of first refusal must be eliminated.

BTA-wide Interference Protection

Under the newly adopted rules, a BTA licensee will have the right to apply for any remaining MMDS channels in the BTA as well as for up to two unused ITFS channel groups in the BTA pursuant to the procedures of Section 74.990 through 74.992 of the Rules. The BTA

licensee will be given a protected service area encompassing the entire BTA for any MMDS or ITFS stations that may be licensed to it in the BTA, and also apparently for any MMDS stations on which the BTA licensee leases capacity (by virtue of its protected status on MMDS frequencies throughout the BTA). Thus, the BTA licensee may have BTA-wide protected service areas on any two of the A, B, C, D or G ITFS groups and it will always have BTA-wide protected service areas on the E, F and H groups, which are adjacent to the D and G ITFS groups.

Unless the FCC makes clear to the contrary, the apparently unintended effect of the new rules would be that any application for a new ITFS station or a modified ITFS station (which modifications increase signal strength in any direction, change polarization or make any other change implicating interference issues) on the D and G ITFS groups, and in some cases on any ITFS group, will, as a result of inevitable predicted co- or adjacent channel interference within areas in the BTA, only be able to proceed with the consent of the BTA licensee. Such consent would be necessary even if the ITFS application proposes facilities that would not interfere with the receive sites or protected service areas of any licensed or previously proposed ITFS or MMDS stations.

The effect of such an approach would be to carve out two ITFS groups (the D and G groups), and in certain cases perhaps all the ITFS groups, over which the BTA licensee would have life or death power over educators seeking to use frequencies that are reserved for educational use. A BTA licensee could simply deny educators the right to use ITFS channels despite the lack of adverse affect on actual wireless cable facilities, or it could demand any concession it deems useful (such as an excess capacity agreement on unfair terms) in exchange for the right of an educator to activate ITFS channels.

This unfair and one-sided approach would patently undermine the very purpose of the ITFS service--to afford educators the right to transmit educational programming as long as their proposed facilities will not interfere with the actual or proposed facilities of another party. The ITFS Parties do not believe the FCC meant to make the ITFS service a mere appendage to wireless cable and hold its full effectuation hostage to the BTA licensee. The FCC needs to clarify the BTA-wide protected service area of BTA licensees to the extent of requiring ITFS applicants only to show that their proposed facilities will cause no interference to any actual or previously proposed ITFS or MMDS facility. The BTA-wide protected service area would apply with full force, of course, to MMDS applicants.

Section 21.938(c) Issue

In new Section 21.938(b), the FCC specifies that BTA licensees must not cause harmful interference to the protected service areas of other BTA licensees and MMDS licensees/applicants or to the licensed receive sites or protected service areas of ITFS stations. However, in Section 21.938(c), which makes the BTA licensee responsible, at its expense, to correct any condition of harmful interference, the rule only explicitly protects incumbent MMDS licensees, not ITFS licensees. The ITFS Parties believe that the failure to mention ITFS incumbents was an oversight and that the rule should be so clarified.

Conclusion

The FCC should reconsider the Report and Order by eliminating the BTA's licensee's right of first refusal to enter ITFS excess capacity agreements. It should also make clear that ITFS applicants need only show interference protection to licensed and previously proposed ITFS or MMDS facilities, and not to the entire BTA. and it should clarify that the interference protections of Section 21.938(c) apply equally to ITFS incumbents.

Respectfully submitted,

AREA COMMISSION OF GREENVILLE TECHNICAL COLLEGE

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM

CALIFORNIA STATE UNIVERSITY

DALLAS COUNTY COMMUNITY COLLEGE DISTRICT

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THE OHIO STATE UNIVERSITY

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